

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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DAVID CHRISTENSON and  
ANNIKEN PROSSER,

Plaintiffs,

Case No. 20-cv-194

v.

ALEX AZAR, in his capacity as Secretary  
of the United States Department of Health  
and Human Services,

Defendant.

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DEFENDANT'S REPLY BRIEF IN SUPPORT OF HIS  
CROSS-MOTION FOR SUMMARY JUDGMENT

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Defendant Alex Azar, Secretary of the United States Department of Health and Human Services, by its undersigned counsel, submits this reply brief in support of his cross-motion for summary judgment.

Initially, the Secretary withdraws any argument that, in Medicare coverage cases, the Appropriations Clause limits the normal application of mutual offensive collateral estoppel on the basis of a final judicial judgment. Additionally, to the extent that the Secretary's opening brief in this case suggested that mutual offensive collateral estoppel is categorically unavailable against the federal government, the Secretary withdraws that argument.

The Secretary further notes that in its reply brief, plaintiff raises the new argument that it is improper for the Secretary to assert allegedly contradictory positions in his cases, pointing to plaintiff's brief in *Lewis v. Azar*, 18 CV 2929 (D.D.C.). Pl. Reply at 15. In *Lewis*, however, the Secretary asserted collateral estoppel based on a prior *district court* opinion, rather than the non-

precedential ALJ decision at issue here. Moreover, even if collateral estoppel were applicable in this case (it is not), the issue in Prosser's prior ALJ decision was not identical (or even actually litigated) because that decision did not make a finding that Medicare coverage broadly exists for TTFT. AR 4262 (limiting coverage to claims for August 16, 2018, September 16, 2018, and October 16, 2018). This is in line with the broad principle that tribunals can limit the preclusive effects of their decisions. *See* 13C C. Wright & A. Miller, Federal Practice and Procedure § 4424.1 (3d ed.). Plaintiff has not identified any case holding that a non-precedential ALJ decision binds the Secretary. In all other respects, the Secretary relies on his memorandum in support of defendant's cross-motion for summary judgement and in opposition to plaintiffs' motion for summary judgment.

For the reasons set forth above, the Court should affirm the final agency decisions, dismiss all claims against the defendant, and deny all claims for relief asserted by the plaintiffs.

Dated at Milwaukee, Wisconsin this 22nd day of May, 2020.

Respectfully submitted,

MATTHEW D. KRUEGER  
United States Attorney

By: /s/ Chris R. Larsen

CHRIS R. LARSEN  
Assistant United States Attorney  
Wisconsin State Bar Number: 1005336  
Attorneys for Defendant  
Office of the United States Attorney  
Eastern District of Wisconsin  
517 East Wisconsin Avenue, Room 530  
Milwaukee, Wisconsin 53202  
Telephone: (414) 297-1700  
Fax: (414) 297-4394  
Email: [chris.larsen@usdoj.gov](mailto:chris.larsen@usdoj.gov)

Of Counsel:  
ROBERT P. CHARROW  
General Counsel

ALAN S. DORN  
Chief Counsel, Region V

AMELIA WALLRICH  
Assistant Regional Counsel  
Office of General Counsel  
United States Department of  
Health and Human Services, Region V  
233 North Michigan Avenue, Suite 700  
Chicago, Illinois 60601